No. 97-1911

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In The

Supreme Court of the United States

October Term, 1997

IN RE:

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; SALES PRACTICES LITIGATION; ALL AGENTS' ACTIONS,

MICHAEL R. WEAVER, *et al.*,

Petitioners,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

I. When two parties enter into an agreement, does the agreement determine when issues or claims will be arbitrated or does a presumption in favor of arbitration overrule an agreement to exclude certain types of claims from arbitration?

II. When the Plaintiffs cannot recover on their claims without proving the alleged nature of a company's insurance practices, does the "insurance business" exception found in the National Association of Securities Dealers (NASD) Code of Arbitration Procedure preclude arbitration of the Plaintiffs' employment disputes?

LIST OF ALL PARTIES

Rick A. Martin, Plaintiff/Petitioner

Michael Weaver, Plaintiff/Petitioner

Eugene Kroll, Plaintiff/Petitioner; case filed April 10, 1996

Carol Hales, Plaintiff/Petitioner; case filed April 30, 1996

Anthony Ybarra, Plaintiff/Petitioner; case filed May 7, 1996

Lori Anderson, Plaintiff/Petitioner; case filed September 11, 1996

Rebeca Montero, Plaintiff/Petitioner; case filed September 11, 1996

Wilmer Sigwarth, Plaintiff/Petitioner; case filed September 11, 1996

Stephen Demaris, Plaintiff/Petitioner; case filed October 18, 1996

Theodore Willenbring, Plaintiff/Petitioner; case filed October 18, 1996

Darrell Dunn, Plaintiff/Petitioner; case filed October 30, 1996

Greg Knutson, Plaintiff/Petitioner; case filed October 30, 1996

Donald Hales, Plaintiff/Petitioner; case filed March 27, 1997

Earl Schulenburg, Plaintiff/Petitioner; case filed March 27, 1997

Anthony Bodway, Plaintiff/Petitioner; case filed January 30, 1998; and

G. Annette Nantz, Plaintiff/Petitioner;

The Prudential Insurance Company of America, Defendant/Respondent.

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FURTHER REASONS FOR GRANTING THE WRIT

I.

ANY AGENT WHOSE CASE WAS TRANSFERRED INTO MULTIDISTRICT LITIGATION MAY APPEAL ANY ADVERSE DECISION AFFECTING THE MULTIDISTRICT PROCEEDING.

All former Prudential agents involved in this litigation were drawn into multidistrict litigation. The objective is to provide centralized management of pretrial proceedings to assure the just, efficient and inexpensive determination of every action. *Matter of New York City Mut. Sec. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978), *In re Nat'l Student Mktg. Litig.*, 368 F. Supp. 1311, 1316 (J.P.M.L. 1973). Since all consolidated cases are treated the same, all parties in the multidistrict proceeding have standing to appeal an adverse decision.

The Neff petitioners' cases were transferred to the multidistrict court during the Third Circuit proceedings. Additional actions that come to the attention of the judicial panel on multidistrict litigation, even after consolidated proceedings have begun, are treated as "tag along" actions. *In re Preferential Drug Prod. Pricing Antitrust Litig.*, 429 F. Supp. 1027 (J.P.M.L. 1977). Judge Wolin stayed the tag along actions pending the Third Circuit's decision and dismissed **all** agent actions pursuant to the Third Circuit's decision. Even the Third Circuit case title refers to all agents: *In re the Prudential Ins. Co. of Am. Sales Practices Litigation **All Agent Actions***, 133 F.3d 225 (3d Cir. 1998) (emphasis added).

It was understood that all agents, including the Neff petitioners, were parties to the appeal and would be affected by the Third Circuit's decision. There was no need to intervene. Reconsideration of the dismissal orders would involve a review of the Third Circuit's decision. The District Court has no authority to

reconsider, alter or amend the Third Circuit's Order. All Petitioners, including the Neff petitioners, requested a rehearing or a rehearing *in banc* from the Third Circuit, which were denied. Seeking review of a different kind from the Third Circuit would have put the attorneys and the Petitioners at risk of sanctions. A petition for certiorari was the only appropriate action.

Judge Wolin appointed Neil Maune liaison counsel to represent **all agents** in all multidistrict proceedings. The case reporter specifically states "Neil J. Maune (Argued for **All** Appellees)." *In re the Prudential Ins. Co. of Am. Sales Practices Litig. All Agent Actions*, 133 F.3d at 227 (emphasis added). Thus, any adversely affected agent may appeal the decision.

Assuming, *arguendo*, that the Neff petitioners were not parties to the Third Circuit appeal, they are third party beneficiaries and parties in interest to the appeal. They are also aggrieved parties. An aggrieved party is "one whose legal right is invaded by an act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment." Black's Law Dictionary, 6th Ed. The Neff petitioners' rights were directly and adversely affected by the Third Circuit's ruling and the dismissal of their cases. They are entitled to be heard on appeal.

Prudential claims third party beneficiary status since it benefits from all cases being dismissed. Yet, Prudential opposes anyone who was adversely affected also being third party beneficiaries with standing to appeal. Prudential seeks to reap the benefits of multidistrict litigation, without accepting any of the disadvantages.

Title 9 U.S.C. § 16(a)(3) permits an appeal from "a final decision with respect to an arbitration." *Stedor Enter., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991). The provision applies equally to decisions favoring litigation or favoring arbitration. *McDermott Int'l v. Underwriters at Lloyds*, 981 F.2d 744, 747 (5th Cir. 1993). The Third Circuit's order remanded all agent cases

for dismissal. An order compelling arbitration is a final and appealable order when made. *Francesco's B., Inc. v. Hotel and Restaurant Employees and Bartenders Union, Local 28*, 659 F.2d 1383, 1388 (9th Cir. 1981). The ninety day time in which to appeal the Third Circuit's decision was not suspended. Appeal after arbitration would have been untimely. Therefore, the Petition for Writ of *Certiorari* was the only applicable and appropriate option available to the Petitioners and should be granted.

II.

THE FILING DATES IN THE PETITION ARE THE CORRECT FEDERAL COURT FILING DATES FOR ALL PETITIONERS WHOSE CASES WERE ADVERSELY AFFECTED BY THE THIRD CIRCUIT'S DECISION.

In Minnesota state court, service of a summons and complaint commences a lawsuit. Minn. R. Civ. P. 3.01, 48 M.S.A. In Federal Court, a lawsuit is commenced by filing the complaint in federal court. Fed. R. Civ. P. 3. A plaintiff then has 120 days in which to serve the defendant(s). Fed. R. Civ. P. 4(m).

The instant petition was accurate contrary to Respondent's footnote number thirteen. Since the federal filing dates are the only dates of interest in federal court, the petition refers to the federal court filing dates. Prudential misleadingly uses the state court filing dates which do not apply in federal court. The Petitioners generally used only the federal filing dates to keep matters consistent throughout the multidistrict proceeding and to avoid unnecessary confusion.

Prudential's January 12, 1998, letter to the Third Circuit stated that it was a member of the NASD at the time each of the agents executed U-4s, at the time their employment with Prudential ended, and when Prudential moved to compel arbitration. However, Prudential terminated its association with the NASD on May 22,

1996. Petitioners Anderson, Montero, Sigwarth, Demarais, Willenbring, Dunn, Knutson, Donald Hales, Schulenburg and Bodway filed their complaints in federal court **after** Prudential was no longer an NASD member. Prudential disregarded its duty to reveal this information to the court. Since Prudential was no longer an NASD member, the NASD provisions do not apply. Prudential's January 12, 1998, letter tries to improperly narrow the issues by referring to only the parties Prudential chose to name on appeal.

III.

THE CASES RESPONDENT CITES TO ASSERT THERE IS NO CONFLICT AMONG THE COURTS ARE NOT ON POINT AND OFFER NO PRECEDENTIAL OR PERSUASIVE VALUE TO THE CASE AT BAR.

Prudential cites cases which purportedly hold that whistleblowing on illegal practices will not avoid arbitration. However, these cases are not binding on the Circuit courts or this Court. Further, the core issues in these cases are unrelated to the insurance aspect of the businesses.

> In *Trumbetta v. Metropolitan Life Ins. Co.*, No. 94-3275, 1994 WL 481152 (E.D. Pa. Sept. 1, 1994), . . . the dispute did not fall under the business exception because "although the plaintiff (a former insurance sales agent) [had] made some **general** allegations concerning the defendant's business practices . . . the **actual basis** for each of his claims [was] the conduct of his supervisors that led to his constructive discharge." Similarly, in *Prudential Ins. Co. v. Shammas*, 865 F. Supp. 429, 432 (W.D. Mich. 1993), . . . a former insurance sales agent's employment discrimination claims did not fall under the insurance business exception because the suit concerned the **conduct of**

> **other employees toward the plaintiff** and "had nothing to do with the insurance aspect of Prudential's business." *See also Foley v. Presbyterian Ministers' Fund*, No. 90-1053, 1992 WL 63269 (E.D. Pa. March 19, 1992) (holding that the language of the insurance business exception was not broad enough to cover **personnel** practices of insurance companies); *Wojcik v. Aetna Live Ins. and Annuity Co.*, 901 F. Supp. 1282, 1286-87 (N.D. Ill. 1995) (requiring that the plaintiff **allege unlawful insurance practices, not merely wrongful employment conduct** directed at plaintiff to invoke exception). *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 800 (10th Cir. 1995) (emphasis added).

The Petitioners have alleged unlawful insurance practices which successfully triggers the insurance business exception. *Wojcik*, 901 F. Supp. at 1292, *clarified by* 916 F. Supp. 729. Unlike the cases cited by Prudential, the instant allegations of illegal insurance practices form the **center** of the claims and should be excused from arbitration.

IV.

A PRESUMPTION IN FAVOR OF ARBITRATION SHOULD NOT OVERRULE THE PLAIN TERMS OF THE AGREEMENT WHICH EXCLUDE CERTAIN TYPES OF CLAIMS FROM ARBITRATION.

Federal policy does not favor arbitration; rather, federal policy is to ensure the enforceability, according to the terms, of private agreements to arbitrate. *Volt Info. Sciences, Inc. v. Stanford Jr. Univ.*, 489 U.S. 468, 476, 109 S. Ct. 1248, 1254, 103 L. Ed 2d 488, 498 (1989). A court's "task in these cases . . . is to ascertain whether there exist 'exceptional' circumstances . . . that can suffice to justify the surrender" of jurisdiction. *Moses H. Cone Mem'l*

Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26, 103 S. Ct. 927, 942, 74 L. Ed. 2d 765, 786 (1983).

Courts are not to twist the language of a contract to achieve a result which requires arbitration. *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419-20 (11th Cir. 1990).

> It is one thing to construe a contract to require the arbitration of a dispute. But it is quite another to rewrite a contract to require arbitration. A court simply cannot do that.

In re the Prudential Ins. Co. of Am. Sales Practices Litig. All Agent Actions, 133 F.3d at 236 (Greenberg, J. dissenting). To compel arbitration of the instant claims, requires a strained and twisted reading of the relevant provisions.

The Third Circuit held that it could not "say with certainty what is meant by 'intrinsically insurance' claims, and whether it embraces employment disputes." *Id.* at 234. However, whether an issue is an arbitrable one is a legal question for the court, and the power to determine arbitrability carries with it the power to define and limit arbitration. *Refinery Employees Union of the Lake Charles Area v. Continental Oil Co.*, 268 F.2d 447 (5th Cir. 1959), *certiorari denied* 361 U.S. 896, 80 S. Ct. 199, 4 L. Ed. 2d 152. Courts are bound to interpret contracts in accordance with the intentions of the parties — even if the effect limits arbitration. *Mastrobuono v. Shearson, Lehman, Hutton, Inc.*, 514 U.S. 52, 57, 115 S. Ct. 1212, 1216, 131 L. Ed. 2d 76, 84 (1995).

> Courts are perfectly capable of looking beyond the face of a complaint to determine whether or not the dispute really involved a defendant's insurance business.

In re: Prudential Ins. Co. of Am. Sales Practices Litig. 924 F. Supp. 627, 640 (D.N.J. 1996).

If the exception was intended to apply solely to "any dispute, claim or controversy" other than employment disputes, the 1993 amendment would have followed rather than preceded the "exception" phrase. *Young v. Prudential Ins. Co. of Am.*, 688 A.2d 1069, 1081 (N.J. Super. Ct. App. Div. 1997). The present claims "fall outside the insurance exception **only** if we conclude that **no** employee's claim can **ever** be subject to th[e] exception." *Id.* at 1082. (emphasis added). The NASD meant to exempt **any** dispute involving the insurance business of an insurance company member from compulsory arbitration, not just those involving specific classes of individuals. *Thomas James Assoc., Inc. v. Jameson*, 102 F.3d 60, 64 (2d Cir. 1996) (emphasis in original).

> [A] dispute implicating the legality of insurance practices surely is a dispute involving an employer's insurance business . . . [I]f the exception to the obligation to arbitrate employment controversies for disputes involving the insurance business is inapplicable here, it is difficult to understand when it ever would be applicable.

In re the Prudential Ins. Co. of Am. Sales Practices Litig. All Agent Actions, at 236 (Greenberg, J. dissenting).

V.

THE PETITIONERS ARE NOT PRESENTING ANY NEW ISSUES ON APPEAL.

Ordinarily, this Court will consider only questions set forth in the petition for *certiorari*. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645, 646, 112 S. Ct. 1644, 1649, 118 L. Ed. 2d 280, 288 (1992). Prudential claims the only issue before the Third Circuit was

> did the District Court err in holding that appellees did not have to arbitrate their pending employment-related claims because they fall within the 'insurance business' exception to the NASD Code of Arbitration Procedure?

Resp't Br. at p. 10. The reversal of that issue is what the Petitioners are appealing.

Assuming, *arguendo*, that the Petitioners were trying to raise new issues on appeal, this Court may consider issues waived below if the issues are so integral to the decision that they could be considered fairly subsumed by the questions presented. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37, 111 S. Ct. 1647, 1658, 114 L. Ed. 2d 26, 44 (1991) (Stevens, J. dissenting). Questions presented for review will "include every subsidiary question 'fairly presented therein.' " *Communist Party of the U.S. v. Subversive Activities Control Bd*, 254 F.2d 314, 321 (D.C. Cir. 1958).

The impact of Prudential's change in NASD membership status on its ability to compel arbitration is essential to the decision. The U-4 provisions apply only while Prudential remains an NASD member. In late May of 1996, Prudential did not reveal to the Neff Petitioners, nor apparently did it reveal to the District Court, that it had ended its NASD membership on May 22, 1996. A fully informed decision involves a consideration of Prudential's NASD membership status on its ability to compel arbitration.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Third Circuit's decision be reversed and the Petitioners be allowed to proceed with their cases in court.

Respectfully submitted,

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